Democratizing the App Store

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As of March 2021, several State bills in the United States have been launched to address the antitrust issues with the iOS App Store and Google Play Store. The two Tech Giants Apple and Google—who jointly control 99 percent of the mobile app market in the U.S.—are charging software developers up to a 30 percent commission on the price of paid apps and in-app purchases. This fee "business" has brought Google and Apple a combined income of $33 billion last year.

While one of the farthest legislative attempts to regulate app stores in Arizona has recently been postponed by the State Senate, a general trend to address the "gatekeeper" role of Big Tech, such as Amazon and Google, are visible both in the U.S. and EU. When attempting to democratize app stores, legislators should aim to address both static and dynamic harm to competition by allowing small developers and startups easy access to app stores. This would both decrease prices for consumers and allow for more innovation and consumer choice. Rather than being ruled by large corporations and intermediaries, the community of consumers should choose which apps they prefer. This approach would level the playing field and allow for fair and effective competition—the main goal of antitrust laws.

Google and Apple Charge Developers 30 Percent Fee in their App Stores

Tech Giants have justified these fees citing investments into research & development (R&D) of the app stores, and reduced fees of 15 percent for smaller developers. While it seems fair to cover the costs of administering the app store and recouping some profit for their R&D investments, current fees seem prohibitively high, creating barriers to entry and excluding existing and nascent new competition. Tim Sweeney, co-founder of Epic Games argues that an 8 percent fee should be sufficient to run a digital storefront profitably. Furthermore, Apple and Google force online providers who exclusively sell digital goods to use their payment system, while other businesses that also sell physical goods, such as Amazon or Uber, are allowed to use their own payment processing. This distinction seems arbitrary and discriminatory.

In August 2020, Epic Games, the developer of the game "Fortnite," filed a private lawsuit against Apple in the District Court for Northern California for violating antitrust laws (*Epic Games v. Apple*). Epic Games has filed a similar lawsuit against Google (*Epic Games v. Google*). Epic Games' complaint against Apple makes three arguments: 1) the 30 percent fee on app and in-app purchases (of the in-game currency called "V-Bucks") constitutes an unlawful maintenance of Apple's monopoly in the mobile apps market (violating Section 2 of the Sherman Act), it unreasonably restrains trade by introducing high entry barriers (violating Section 1 of the Sherman

Act) and violates the essential facilities doctrine by restricting competitors' access to their app stores. The Apple case has passed the pre-trial phase and the first court date is set for May 3, 2021.

A group of big developers, including Epic Games, Spotify and Match.com have formed the Coalition for App Fairness. With this initiative, they have brought the harmful practices of app stores into the spotlight of the media and political agendas of the individual States. We can observe a parallel movement on the same issue in the EU. Spotify, the Swedish audio streaming provider has submitted a complaint against Apple to the European Commission in 2019. Spotify claims that Apple unfairly restricts rivals to its own music streaming service Apple Music and also protests against the 30 percent fee levied on app developers to use Apple's in-app purchase system. Based on this complaint, the European Commission opened an antitrust investigation against Apple's app store in June 2020.

State Activism against Big Tech

One of the farthest legislative attempts to regulate app stores was the State Bill HB2005 in Arizona that was passed by the Arizona House on March 3, 2021. The Bill requested that software developers are allowed to use their own payment processors and no longer need to resort to the fee-based services of Apple and Google. Against the hopes of consumers and developers, the bill did not make it before the Arizona Senate and is postponed to the next session.

A similar legislative attempt was started in North Dakota. However, the Senate bill on app-stores legislation failed in February against the lobbying efforts of Google and Apple. The bill would have required Apple to let iPhone and iPad users download alternative app stores and let developers change their payment options.

Eyes are now on other state legislations against Big Tech, including New York, Massachusetts, Illinois, Minnesota, Georgia and Florida. Minnesota's bill, which was introduced in February this year, specifically targets Apple's and Google's smartphone app fees. At the same time the bill HD 2125, which promotes competition among app stores, was introduced in Massachusetts. New York has introduced a more extensive legislation to tackle Big Tech with its Twenty-First Century Anti-Trust Act last summer. In summary, the Act seeks to amend the State's antitrust law to fit the needs of the digital economy and asks for a stricter regulation and control of monopolies.

Bipartisan Agreement on Stricter Regulation of Big Tech

From a political angle, on the matter of regulating Big Tech through antitrust law, Republicans and Democrats seem to be aligned—albeit for different reasons. While progressives are in support of stricter antitrust enforcement against the Tech Giants to protect consumers, Conservatives often want to promote small- and medium-sized enterprises or are fighting against the restriction of free speech on social media.

Despite the different reasoning, the direction is clear: stricter regulation of Big Tech. Regina Cobb, a Republican sponsoring the Arizona bill said:*"We can no longer afford to let Big Tech monopolize our lives."* The bipartisan support of new antitrust legislation against Big Tech has picked up pace since the 2020 presidential election and the House's antitrust hearing of the Big Four (Amazon, Apple, Facebook and Google) in September 2020.

How the App Store violates Antitrust Law

Google's and Apple's conduct is anticompetitive and violates antitrust laws. Andy Vargas, a Democrat who is sponsoring the legislation in Massachusetts summarizes Apple's conduct as follows: *"The forced 30 percent payment processing fee means consumers pay more, competition is stifled, and startups have a tougher time scaling because every piece of revenue they generate is undercut."* For unlawful monopolization (Section 2 of the Sherman Act), the antitrust laws ask for two cumulative requirements: market power and anticompetitive behavior. This means that only a firm with large *market power*, such as Apple or Google, can violate antitrust laws through anticompetitive conduct. Smaller firms, like developers or startups do not fall within the scope. The rationale is that regulation should not interfere with the free market, unless one firm (monopoly) or a few firms (oligopoly) have become so large that they exploit their dominance to the detriment of other competitors and consumers. While the evaluation of market power is an effects-based test, in the U.S. called the SSNIP ("Small but Significant Non-transitory Increase in Price") test and in the EU the SIEC ("Significant Impediment to Effective Competition") test, case law has specified market shares that help indicate market dominance. These shares strongly depend on the market structure and the specific sector. As guiding principle (not a fixed rule), a market share of over 50 percent (in the U.S.) and 40 percent (in the EU) often constitutes market power. Both Apple and Google each individually control about 50 percent (Apple 52 percent and Google 47 percent, May 2020) of smartphone operating system subscribers in the U.S.—which would be prima facie evidence of market power in both jurisdictions.

Monopolization in the U.S., or abuse of dominant position in the EU, is the *anticompetitive conduct* of firms with market power that harms competitors and consumers. For many decades, courts have recognized foreclosure (exclusion) of competition by a firm with market power as an unlawful monopolization. By asking competitors to pay a prohibitively high fee to access the app store (i.e., 30 percent) or excluding them from the app store if they do not pay the fee (as with Epic Games), Apple and Google create barriers to entry, which both exclude existing competition and deter new competitors from entering the market. Another anticompetitive conduct that is currently being investigated by the European Commission is the App Stores rules and how they allow self-preferencing of Apple's own streaming service (Apple Music) over other developers like Spotify.

Theory of Harm and Democratizing the App Stores

Vargas again cuts right to the chase: *"Consumers deserve fairness and our small app developers—especially people of color often left out of scaling startups—deserve equitable opportunities to pursue their big ideas."* While in the EU, the limitation of competition is against the Treaty's competition law goals and can constitute a violation on its own, the U.S. antitrust laws require harm to consumers. Hence, the question is: How are consumers harmed if app developers need to pay the fee?

Consumers are often harmed indirectly, through the foreclosure (exclusion) and stifling of competition. When talking about consumer harm, we distinguish between two forms: static harm and dynamic harm. Static harm includes anticompetitive conduct which increase prices for consumers or reduces quality of the goods and services. Even though this harm is not at forefront of the discussed app store practices, consumers also face static harm. Tech Giants forbid the app providers from telling consumers that their price may be cheaper if purchased directly. For example, a Spotify subscription costs $9.99 per month if users sign up on the company's website and $12.99 for users who signed up on their iPhone, as the state representative Kasey Carpenter, the lead Republican sponsoring the Georgia legislation, noted during a hearing last month. The higher prices result from the high access fees which developers pass on to consumers. Selling apps over the app store instead of subscribing directly through the provider allows Apple and Google to collect valuable consumer data—which they can use to imitate successful services (Spotify), create their own private labels (like Apple Music), and then steering consumers towards their own labels (see more about steering and self-preferencing in the Thurman Arnold Amazon Report).

Dynamic harm is the curtailing of innovation or limitation of consumer choice by excluding existing or nascent competition. By charging a prohibitively high fee—and 15 percent may already be too high for a small startup to enter the market—the app stores make it unattractive and unprofitable for existing or new firms to offer innovative products. While large corporations like Epic Games and Spotify may have the money to file a private lawsuit against Tech Giants, small developers often exit the market silently, limiting the product portfolio for consumers.

When speaking of democratizing the app store, addressing both harms (static and dynamic) by allowing small developers and startups easy (not prohibitory costly) access to app stores, and thereby allowing for more innovation, will eventually decrease prices (lower subscription fees) and increase consumer choice (more app variety). Rather than being ruled by large corporations and intermediaries, the community of consumers should choose which apps they prefer—which creates a level playing field and fair competition for small innovative developers.

Essential Facilities Doctrine for Digital Markets

At the beginning of modern antitrust laws, a line of cases was litigated, both in the U.S. and Europe, in which owners of large infrastructures such as railways and bridges were sued for limiting access to essential facilities by charging high access fees. Because the construction of large infrastructure is costly, such infrastructures are often the only way (therefore essential facility) for business and consumers to cross a river or transport their goods from point A to B.

Famous cases include the Terminal Railroad case in the U.S. of 1912, and the Port of Rødby case, litigated in the EU in 1994. In the Terminal Railroad case, fourteen railroads unified to build and maintain a cost-intense railroad bridge over the Mississippi River. While this endeavor sounds legitimate and beneficial, the (antitrust) problem arose when the companies prohibited rivalry railroads to get access to the bridge, which unreasonably restricted trade (Section 1 Sherman Act). Similarly, in the EU case, the Danish transport minister refused to grant a Swedish company access to the facilities of the Port of Rødby.

The essential facilities doctrine has been dormant for many years and has only re-emerged recently in relation to digital markets regulation. The idea is that Big Tech companies like Amazon and Apple have built a large infrastructure, like an e-commerce platform or app store, that are the only way for businesses and consumers to access services and sell their products. For example, in the case of Amazon, it is often too expensive for small businesses to set up their own e-commerce website and to advertise their products to a large consumers base, so instead they sell their products on the Amazon platform. Similarly, the Apple and Google app stores are the only means for developers to bring their apps to the market. In the words of Margrethe Vestager, the European Commissioner for Competition: *"It appears that Apple obtained a 'gatekeeper' role when it comes to the distribution of apps and content to users of Apple's popular devices."* Hence, large tech companies constitute a "bottleneck" and decide who gets access to their facility and for what price. Because small businesses and consumers are dependent on their platforms, Tech Giants often exploit their market power by refusing access or charging high access fess—as in the case of the iOS App Store and Google Play Store.

In the EU, this gatekeeper problem has been taken up and is being addressed in the draft of the Digital Markets Act. The idea of this revolutionary piece of legislation is to regulate the conduct of Tech Giants to ensure fair competition and access, manage data and thereby limit consumer harm. The biggest challenge of the essential facilities doctrine, both in the 20th century and in the Digital Age is whether and when gatekeepers have a duty to give rivals access to their facilities. The Digital Markets Act has solved this issue with a threshold rule—only firms that are active in at least three EU countries and have an annual turnover of over EUR 6.5 billion in the last three financial years—qualify as gatekeepers. Currently Amazon, Apple, Google, Facebook, Uber and Airbnb qualify as gatekeepers under this rule.

In summary, the first lever to fix the ruling of Tech Giants over smaller startups and consumers is to create legislation—as it is being done in different U.S. States and in the EU by means of the Digital Markets Act. The second lever to influence current Big Tech regulation is through enforcement: by antitrust authorities (like the European Commission or the Federal Trade Commission), and the courts (especially in the U.S.). It’s time to act!